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87-2054
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DENNIS M. O'CONNOR, et al.,
Petitioners,

VS.

ESTATE OF MARILYN MARIE CONNERS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the exercise of professional judgment standard enunciated by the Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982) as the test of state mental hospital administrators' entitlement to qualified immunity can be defeated by a claim of gross negligence.

2. Is the claim of gross negligence by mental hospital administrators in failing to protect a patient by enacting adequate policies sufficient to state a cognizable constitutional deprivation of the due process clause.

3. Can state mental hospital administrators' qualified immunity be defeated by contrary expert testimony, without any showing that the opposing expert's opinion represents judgments, practices and standards accepted within the relevant profession.

LIST OF PARTIES

Petitioners: Dennis M. O'Connor; Fred Valenzuela; Stephen Donoviel; Thaddeus Kostrubala.

Respondents: Estate of Marilyn Marie Conners; Howard Meredith; Lillian Beatty.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix 1 at A1-A6. The decision of the United States District Court for the Northern District of California is set forth in Appendix 2 at A7-A9.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on May 17, 1988, and is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF FEDERAL LAW

1. United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. United States Constitution, Fourteenth Amendment, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Nature of the Controversy

Plaintiffs' decedent, Marilyn Marie Conners, was a mental patient at Napa State Hospital ("NSH") in April of 1985, when she was lured from the grounds by another patient, and murdered.[1] Rather than proceeding against the murderer, or in negligence against the hospital staff who actually supervised the patients, Ms. Conners' heirs brought this civil rights action against petitioners, the Director of the California Department of Mental Health, and the Executive Director, Clinical Director and Medical Director at the hospital.

The undisputed facts below established that in April of 1985, and at present, NSH had a policy which allowed the admission of Penal Code patients for treatment at the hospital.[2]

However, Penal Code patients could only gain admission to NSH if, following an evaluation of their previous history and present mental state, it was determined that these patients did not present an undue risk of violence to other patients. All risk assessments were reviewed by the medical director at NSH to ensure a proper evaluation of a Penal code patient's potential for violence had been done. The medical director is a medical doctor, and a fully-qualified psychiatrist.

Following admission to NSH, Penal Code patients were kept segregated from the general patient population at NSH, in locked wards. In order to obtain grounds privileges (called a "P-Card"), a Penal Code patient was required to undergo a separate, and additional quasi-judical review of his potential for violence.

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[1] The murderer, one John Lewis Duncan, was named as a co-defendant but has never been served herein.

[2] "Penal Code patients" are mental patients admitted to the care of the California State Hospital system under provisions of the California Penal Code because they are mentally incompetent to stand trial for a crime, or are found not guilty of a criminal offense by reason of insanity. The murderer of plaintiffs' decedent was admitted to NSH under these provisions.

Following an initial assessment by treating staff, a Penal Code patient's risk potential was reviewed and approved not only by the NSH medical director, but by the Clinical Director (a Ph.d. in psychology), the Executive Director of the hospital, and the court which had committed the Penal Code patient.

Moreover, Non-Penal Code patients at NSH were required to undergo a similar evalutation of their vulnerability before they could obtain grounds privileges. If a Non-Penal Code patient was determined to be vulnerable (as Ms. Conners is alleged to have been), the patient could only obtain limited grounds privileges, a "buddy-card" which required the patient to be accompanied while out on the grounds at NSH.

These policies were not the result of mere chance, or administrative neglect, but represented a conscious balancing by the psychiatric, psychological and administrative policy-makers at NSH of the risks of potential violence, against the therapeutic benefit to be gained from allowing grounds access to Penal Code, and non-Penal Code patients at the hospital. Prior to the death of Ms. Conners, these administrators had also investigated and reviewed the violence potential of Penal Code and non-Penal Code patients, and had found that as a group, Penal Code patients were less violent and assaultive than other patients at NSH.[3]

2. Proceedings Below

In their complaint, plaintiffs alleged that these high-level, policymaking hospital administrators had, in addition to the actual murderer, deprived them and their decedent of constitutional rights, in violation of 42 U.S.C. § 1983. Plaintiffs' original complaint alleged that the administrators were responsible for Ms. Conners' tragic death because they allegedly had been guilty of a grossly-negligent failure to protect her from harm.

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[3] Unfortunately, in this case, a Penal Code patient who apparently had "beaten" the risk assessment system, obtained grounds privileges, and lured Ms. Conners off the hospital grounds to murder her. However, no claim has been made, nor any evidence produced, which even hints that the risk-assessments mandated by NSH policies were not performed, thoroughly or otherwise, before grounds privileges were given here.

The defendants' motion to dismiss the original complaint was granted by the District Court, which held that allegations of gross negligence were insufficient to state an actionable claim of constitutional deprivation under this Court's holdings in *Daniels v. Williams,* 42 U.S. 327 (1986) and *Davidson v. Cannon,* 434 U.S. 344 (1986).

In their amended complaint, plaintiffs merely substituted the conclusory characterization "deliberate indifference" to their allegations, and specified the above-mentioned Penal Code patient policies as being the cause of their decedent's death.

In the District Court, the defendant-administrators, petitioners herein, filed a motion to dismiss and for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Setting out in great evidentiary detail the terms of, and therapeutic rationale for the challenged Penal Code patient policies, petitioners claimed they were entitled to qualified immunity under this Court's ruling in *Youngberg v. Romeo,* 457 U.S. 307 (1982).

Despite this clear and unopposed showing, demonstrating the propriety of the challenged policies, the District Court erroneously denied petitioners' motion on the basis of a single declaration submitted in opposition to the motion by a former staff psychiatrist at NSH, Dr. William Schwartzman. (The order of the District Court is set out in Appendix at A7-A9). Dr. Schwartzman's declaration concluded that the Penal Code patient policies at NSH were "grossly and totally inadequate," because they did not incorporate his own methodology for making risk-assessments, a so-called "confrontational approach."[4]

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[4] The so-called "confrontational approach" advanced by Dr. Schwartzman posited the evalutaion of a Penal Code patient's potential for violence by confronting the patient with situations that in the past had triggered violence by the patient. Counsel has been unable, despite a laymen's review of psychiatric texts, to discover any mention of such an approach to risk-assessment, and no evidence (e.g. professional studies, psychiatric literature) was provided by Dr. Schwartzman to support his bold conclusion that his "approach" was valid, and *exclusively,* correct.

Despite the absence of *any* factual showing establishing that Dr. Schwartzman's hypothetical method was recognized in the psychiatric field as the only proper way to perform risk-assessments, the District Court erroneously held that a factual issue, defeating petitioners' claim to immunity, existed.

On immediate appeal to the Ninth Circuit, the denial of petitioners' motion for summary judgment was affirmed. In an opinion to be published in the official reporter, the Ninth Circuit held that (1) the allegations of gross negligence by the hospital administrators in their policy making was sufficient to state a cognizable claim; and (2) the Schwartzman declaration was adequate, standing alone, to defeat petitioners' claim to qualified immunity, making a trial on the merits necessary. The text of the slip opinion of the Ninth Circuit is set out in Appendix 1 at A1-A6.

I

ARGUMENT

INTRODUCTION

By equating this Court's *Youngberg v. Romeo* "exercise of professional judgment" test with a gross negligence standard, the Ninth Circuit has effectively eviscerated state hospital officials' ability to operate their institutions without the fear of micro-management by outside experts, in plenary trial proceedings before the federal judiciary. Petitioners submit that this was precisely the result which this Court sought to avoid in *Youngberg v. Romeo.*

If allowed to stand, the Ninth Circuit's overly-general definition of "clearly established law." announced in this case, will have the practical effect of rendering the assertion of the defense of qualified immunity by hospital administrators impossible prior to trial. Under the Ninth Circuit's ruling, every time a plaintiff is able to produce an expert willing to testify to opinions contrary to those of the hospital administrators claiming immunity, a trial will be required.

The Ninth Circuit's ruling, for these reasons, should not be allowed to stand. Moreover, its holding that a claim of gross negligence by State officials is sufficient to state a claim for violation of constitutional due process rights, actionable under 42 U.S.C. § 1983, conflicts with rulings by other circuit courts of appeals, on an issue of national importance which this Court, to date, has left unresolved. *Daniels v. Williams,* 434 U.S. 327, 334 n.3 (1986). Because of this remaining uncertainty and lack of final definitive guidelines for determining when tortious conduct by State officials rises to the level of a constitutional tort, disposition on writ of certiorari by the Supreme Court of the United States is clearly appropriate here.

II

THE NINTH CIRCUIT HAS ANNOUNCED A NEW TEST GOVERNING QUALIFIED IMMUNITY OF MENTAL HOSPITAL ADMINISTRATORS WHICH IS INCONSISTENT WITH THIS COURT'S RULING IN *YOUNGBERG V. ROMEO*

State officials charged with the administration of state mental hospitals are faced with the duty of balancing two often conflicting obligations: to provide a "safe" environment while, at the same time, ensuring that the patients in their care are, in fact, given therapeutic treatment and not just housed.[5] How state officials meet these obligations is largely not a matter of concern of the federal courts, or the Constitution, and day-to-day decisions by state hospital supervisors are rarely reviewable by the federal courts under 42 U.S.C. § 1983, for two reasons—federal judges and juries are not able to competently balance the relevant state interests involving care and treatment of the mentally-ill; and concerns of federalism prohibit the federal judiciary from converting enforcement of the due process clause of the Fourteenth Amendment into a font of tort law.

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[5] For example, the housing of all mental patients in individual, locked cells would insure that no risk of harm at the hands of other patients could be realized, but would, it can safely be assumed, be non-productive, or counter productive to the patients' treatment needs.

Recognizing these critical concerns, this Court in *Youngberg v. Romeo,* 457 U.S. 307 (1982) states, as the test of whether decisions by state hospital administrators pass constitutional must, the following:

> "We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that '*the Constitution only requires that the courts make certain that professional judgment in fact was exercised.* It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' "

457 U.S. at 321.

This Court went on to state:

> "For these reasons, the [administrator's] decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from *accepted professional judgment, practice, or standards* as to demonstrate that the person responsible actually did not base the decision on such a judgment."

457 U.S. at 323 (emphasis added).

The Court of Appeals decision here cannot be squared with *Youngberg v. Romeo,* and the threat that considered, well-intentioned decisions by mental hospital officials could lead to damage lawsuits for violations of civil rights will doubtless intimidate and deter the officials in the proper, effective implementation of their work responsibilities. The Ninth Circuit had, prior to this decision, recognized this necessity for limited review of mental hospital officials' decisions. *Leslz v. Kavanaugh,* 807 F.2d 1243, 1251 (9th Cir. 1987); *Gibson v. Merced County Dept. of Human Resources,* 799 F.2d 582, 590 (9th Cir. 1986).

III

THE NINTH CIRCUIT'S APPLICATION OF A TEST OF MINIMAL SCRUTINY TO EVIDENCE OPPOSING THE HOSPITAL ADMINISTRATORS' SHOWING IN SUPPORT OF THEIR CLAIM OF QUALIFIED IMMUNITY FAILED TO RECOGNIZE THE PRESUMPTIVE VALIDITY OF THE ADMINISTRATORS' JUDGMENTS REQUIRED BY *YOUNGBERG V. ROMEO*

The Court of Appeals decision was doubly wrong, because, even had it applied a correct legal standard, it failed to subject Dr. Schwartzman's declaration[6] to any meaningful level of scrutiny to determine if it supplied support for the conclusion that the challenged policies violated "*accepted* professional standards"—not just the standards of Dr. Schwartzman. Such a level of review constitutes an abdication of judicial responsibility, for by failing to review the substance of a showing opposing a claim of qualified immunity, any continued survival of the defense is rendered impractical. The Ninth Circuit's approach is inimical to *Youngberg's* mandate—giving a presumption of correctness to official choices. 457 U.S. at 322.

During oral argument, one of the judges of the panel of the Ninth Circuit reflected that the adoption of a test of "proper" exercise of professional judgment would have the effect of throwing the state hospital administrators' qualified immunity "out of the window."[7] Petitioners concur, noting a previous statement of another panel of the Ninth Circuit which eschewed the minimal scrutiny applied by the Court here. In *Leslz v. Kavanaugh,* 807 F.2d 1243, 1251 (9th Cir. 1987), the Ninth Circuit declined to equate federal constitutional standards with optimum standards of mental health care under state law, because thereby

> "the emphasis of *Youngberg* on the judgment of the State's professionals wll be thoroughly undermined. The

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[6] The only substantive evidence submitted in opposition to petitioners' claim to qualified immunity.

[7] Remarks of Hon. Rudi M. Brewster, United States District Judge, sitting by designation, at oral argument, January 14, 1988.

> constitutional standard in the instance would be determined by the views of expert witnesses, and outside consultants could effectively overrule state programs, contrary to *Youngberg*. While *Youngberg* may eventually have to be squared with the duty of a state to prevent deterioration of skills of the retarded committed to its institutions (see Youngberg, 457 U.S. at 327-29, 102 S.Ct. at 2464-65 (Blackmun, J. concurring)) this is by no means the same as requiring the State to provide the best care possible or the optimum location to improve the client's physical, mental and emotional conditions."

By mandating a standard of minimal review of plaintiffs' experts, and failing to require any showing that the expert's opinions constitute standards accepted in the profession, the Ninth Circuit's opinion would effect a significant erosion of the balance between the federal judiciary and state officials which simply cannot be squared with this Court's previous pronouncements on the issue.

IV

THE RULING THAT ALLEGATIONS OF GROSS NEGLIGENCE SUFFICE TO STATE A DUE PROCESS CLAIM IS INCONSISTENT WITH RULINGS IN OTHER CIRCUITS, AND PRESENTS AN UNRESOLVED ISSUE OF NATIONAL IMPORTANCE

In *Daniels v. Williams,* 474 U.S. 327 (1986) and *Davidson v. Cannon,* 474 U.S. 344 (1986), the Court held that allegations that state officials were negligent in causing injury, or in failing to protect a confined person from injury were insufficient to state a claim under the due process clause. However, the Court declined to consider "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protection of the Due Process Clause." *Daniels v. Williams,* 474 U.S. at 334 n.3.

Taking advantage of this loophole, the Ninth Circuit in this case held that a due process claim could be premised upon a finding of "gross negligence" by the state hospital administrators,

without any analysis distinguishing this Court's dicta in *Davidson v. Cannon* "that lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to protect." 474 U.S. at 347-348.

The Ninth Circuit's ruling is inconsistent with opinions from other circuits which hold that gross negligence does not violate the due process clause. *Archie v. City. of Racine,* 826 F.2d 480 (7th Cir. 1987); *Bradbury v. Pinellas County,* 789 F.2d 1513 (11th Cir. 1986); *Rankin v. City of Wichita Falls,* 762 F.2d 444 (5th Cir. 1985).

The distinction between "mere" negligence and "gross" negligence is far from distinct, and has produced criticism among many who see gross negligence as simply negligence "with the addition of a vituperative epithet." *E.g., Wilson v. Brett,* 11 M. & W. 113, 116 [1843], 152 Eng. Rep. 737. Such an indistinct line, which cannot be policed, is not a line worth drawing in constitutional law. Even if it could be patrolled, the line should not be drawn because it does not serve the purposes of the due process clause. As this Court concluded in *Daniels* and *Davidson,* the function of the clause is to control abuses of governmental power, and on that account, the due process clause does not reach governmental errors, but only proscribes intentional deprivations. *Davidson,* 474 U.S. at 347-348.

An error is still an error, "gross" or not, and simply is not unconstitutional, under the thrust of this Court's analysis in *Daniels* and *Davidson.* Errors do not implicate due process, which does not mean "due care." This case raises the issue, and presents the Court with an opportunity to clarifty its previous rulings and resolve the continuing conflict between the rulings of the various circuits on this point.

CONCLUSION

This case raises significant federal issues that were wrongly decided below. The Court of Appeals decision, if allowed to stand, will seriously impair the ability of state mental hospital administrators, and other state officials with policymaking functions.

The Court of Appeals decision is inconsistent with this Court's holding in *Youngberg v. Romeo*, and will undermine the assertion of an important immunity, the existence of which encourages governmental officials to perform their duties without fear of harassing lawsuits.

This case also presents the Court with the opportunity to define the parameters of actionable deprivations under 42 U.S.C. § 1983, a continuing source of conflict between the circuits.

This Court should accordingly grant the petition for writ of certiorari.

Dated: June 14, 1988

Respectfully submitted,

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(Appendices follow)

Appendix 1

For Publication

United States Court of Appeals
for the Ninth Circuit

No. 87-1644
USDC No. C-86-1898-CAL

Estate of Marilyn Marie Conners, by its Administrator,
Howard Meredith; Lillian Beatty,
individuals, as sole heirs of Marilyn Marie Conners,
Plaintiffs-Appellees

vs.

Dennis Michael O'Conner; Fred Valenzuela; Stephen Donoviel;
Thaddeus Kostrubala; John Lewis Duncan,
Defendants-Appellants.

OPINION

[Filed May 17, 1988]

Argued and Submitted January 14, 1988—San Francisco

Appeal from the United States District Court
for the Northern District of California

Hon. Charles A. Legge, District Judge Presiding

Before: Alfred T. Goodwin and Dorothy W. Nelson,
Circuit Judges,
and Rudi M. Brewster,* District Judge

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* The Honorable Rudi M. Brewster, United States District Judge, Southern District of California, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

State officials with management responsibility for Napa State Hospital appeal the denial of their motion for summary judgment based upon qualified immunity from suit. This type of interlocutory appeal in 42 U.S.C. § 1983 damage actions has become more or less routine following *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[1]

In August 1985, Marilyn Conners, a patient at Napa State Hospital was murdered by a penal code patient. Conners' estate and heirs brought this § 1983 damage action against the state director of mental health and three hospital administrators. If the only basis for recovery were the negligence of the hospital, the state would be immune. And unless the individual defendants personally acted in a manner that clearly violated the murder victim's constitutional rights, these defendants are clothed with qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 813-19 (1982). The only question now reviewable is whether these defendants are immune as a matter of law. *See Mitchell*, 472 U.S. at 526, 528 & n. 9.

Conners was admitted to Napa State Hospital in 1985. She was lured from her ward by a penal code patient, John Duncan, who, despite his demonstrated homicidal propensities, [2] was permitted to roam the grounds of the hospital under official and de facto policies then in effect. Duncan led Conners to a remote part of the hospital grounds, where he raped and strangled her. Duncan pled

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[1] *See, e.g., Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987); *White by White v. Pierce County*, 797 F.2d 812, 814-15 (9th Cir. 1986); *Kraus v. County of Pierce*, 793 F.2d 1105, 1108-10 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1571 1987).

[2] Duncan had been admitted to Napa State Hospital after he pled not guilty by reason of insanity to a charge of rape and murder of another young woman. Approximately two or three weeks before Conners' murder, Duncan had committed an assault with a deadly weapon and attempted rape on another female patient. The man's character was thus well known to someone in the hospital, if not to these named defendants.

nolo contendere to charges of second-degree murder and assault with intent to commit rape.

Conners' estate alleged in the amended complaint that Dennis O'Connor and three hospital administrators—Executive Director Fred Valenzuela, Clinical Director Stephen Donoviel, and Medical Director Thaddeus Kostrubala—were grossly negligent and recklessly indifferent to patient safety in approving ground privileges for the penal code patients. This conduct was alleged to demonstrate official indifference to the constitutional right of the victim to a safe environment while confined under state authority. *See Youngberg v. Romeo,* 457 U.S. 307 (1982).

The district court denied summary judgment based upon qualified immunity to suit, finding that there existed genuine issues of material fact. The district court relief primarily upon an affidavit submitted by Dr. William Schwartzman, Conners' psychiatrist at the time of her death, in finding that the estate had demonstrated a jury question as to the defendants' compliance with *Youngberg.*

On appeal, the defendants argue that the trial court erred in finding that the facts alleged could support a finding that they were not entitled to qualified immunity. Our analysis is set forth by *Mitchell*:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .

472 U.S. at 528.

The "clearly established law" test leads us to *Youngberg,* 457 U.S. at 307, which sets forth the constitutional rights afforded to patients who have been involuntarily committed to a state mental hospital. *Youngberg* acknowledged that patients retain "liberty interests in safety" but held that such "intersts are not absolute," given the need to promote other therapeutic goals. *Id.* at 319-20; *see Hoptowit v. Spellman,* 753 F.2d 779, 784 (9th Cir. 1985) (observing that "[p]ersons involuntarily confined by the state

have a constitutional right to [reasonably] safe conditions of confinement"). "The question then is not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process." *Youngberg*, 457 U.S. at 320. Recognizing the need to "show deference to the judgment exercised by a qualified professional, *id.* at 322, *Youngberg* stated:

> [T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323 (footnotes omitted).

Subsequent to *Youngberg*, the Court decided two companion cases concerning the degree of official misconduct necessary to give rise to liability under 42 U.S.C. § 1983 (1982) for violations of the due process clause. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 US. 344 (1986).

We here are presented with an issue which, to the best of our knowledge, has been addressed by no other court: Do *Daniels* and *Davidson* impose scienter, or other culpability requirements such as "conscious indifference," that supersede the discretionary balancing standard of review appropriate under *Youngberg*?

In *Daniels*, the Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." *Daniels*, 474 U.S. at 328 (emphasis in original); *see Davidson*, 474 U.S. at 348 (observing that due process protections "are just not triggered by lack of due care by prison officials"). The *Daniels* Court reserved the question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels*, 474 U.S. at 334 n.3.

In the absence of additional guidance from the Supreme Court, our circuit has followed earlier case law holding that the due process clause can be implicated by certain types of gross negli-

gence. *See Ketchum v. County of Alameda,* 811 F.2d 1243, 1246 & n.3 (9th Cir. 1987) (negligent failure to prevent a prison inmate from escaping does not make prison management liable to rape victims); *Bergquist v. County of Cohise,* 806 F.2d 1364, 1370 (9th Cir. 1986) (inadequate training plus improper supervision of Drug Enforcement Administration agents resulting in armed attack on wrong target can create § 1983 liability if facts add up to gross negligence).

Under *Youngberg's* balancing test, the risk of harm and the burden on the state are weighed in examining discretionary management choices for reasonableness. Liability may be imposed on a professional state officer only when his or her decision is so objectively unreasonable as to demonstrate that he or she actually did not base the challenged decision upon professional judgment. *See Youngberg,* 457 U.S. at 323. We believe that this standard is equivalent to that required in ordinary tort cases for a finding of conscious indifference amounting to gross negligence. Certainly, the *Youngberg* standard is far more stringent than that required for a finding of negligence, which may be demonstrated by a professional's mere failure to exercise the level of care expected of other professionals in the same field. We therefore hold that the inquiry relevant under *Youngberg* has not been affected by the Court's intervening decisions in *Daniels* and *Davidson.*

Youngberg was clearly established law in August 1985, at the time of the events at the core of this case. Under *Mitchell,* the relevant inquiry therefore resolves itself into the question whether the facts alleged by the plaintiff would violate rights described in *Youngberg. See Mitchell,* 472 U.S. at 528 & n.9. We find that the plaintiffs have presented evidence sufficient to preclude summary judgment based upon qualified immunity.

The plaintiffs rely primarily upon the affidavit of Dr. Schwartzman to establish the existence of a factual question of the violation of clearly established rights. A psychiatrist at Napa State Hospital for more than seven years, Dr. Schwartzman also had ten years of experience with violent mental patients. Dr. Schwartzman expressed a professional opinion that the hospital's "approach in dealing with the assessment and determination of

risk from violence, to non-violent patients from violent ones, is grossly and totally inadequate." He stated that penal code patients are not given special consideration. Because assessment criteria are informal and vague, he continued, "patients with considerable violence potential are granted ground passes . . . without careful regard to situations likely to evoke their violent tendencies." Schwartzman stated that hospital staff have received no training on assessment of patients' potential for dangerous behavior. He also claimed that the hospital has been "glaringly deficient in developing any kind of specialized treatment programs for the Penal Code group of patients." He claimed that, despite a history of violence among penal code patients at the hospital, the hospital staff made no attempt to rectify the problems.[3]

The facts alleged in the Schwartzman affidavit, if proven, could reasonably support a trier's finding that the defendants were indifferent to patient safety and had made "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that [they] actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 323. The affidavits presented by the defendants contradicted Schwartzman's claims. The pleadings and affidavits thus presented a genuine issue fact. The trial court correctly denied the motion. We therefore must affirm the denial of summary judgment. We express no opinion on which version of the facts is most likely to prevail.

Appeal dismissed with costs plus attorney fees to be fixed by the trial court if the plaintiffs prevail on the merits.

---

[3] Dr. Schwartzman's views are involved in another type of litigation arising out of his discharge by the hospital. *See* Schwartzman v. Valenzuela, No. 87-1733, decided this date.

Appendix 2

United States District Court
Northern District of California

C-86-1898-CAL

Estate of Marilyn Marie Conners, et al.

vs.

Dennis Michael O'Connor, et al.

Order Regarding (1) Denial of Defendants' Motion for Summary Judgment (2) Granting of Defendants' Motion to Dismiss (3) Setting Trial and Related Calendar Matters

To: Paul T. Hammerness
Deputy Attorney General
350 McAllister Street, Room 6000
San Francisco, CA 94102

The parties having appeared on December 11, 1986 at 3:00 p.m. for a hearing on defendant's motions for summary judgment and to dismiss, said motions having been submitted to the court at that time, the court hereby makes the following orders:

(1) Defendant's motion for summary judgment is denied;

(2) Defendant's motion with respect to the second cause of action for the pendent state action of wrongful death is dismissed for lack of jurisdiction pursuant to the holding in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984).

The court hereby makes the following order with respect to the setting of a trial date and related matters:

(1) The trial of this matter is set for 9:00 a.m. on June 29, 1987.

(2) All discovery must be completed on or before April 30, 1987;

(3) All experts must be disclosed on or before March 31, 1987;

(4) Pre-trial conference in this matter is set for 3:30 p.m. on May 14, 1987;

(5) Settlement Conference will be held April 30, 1987 at 10:00 a.m.;

(6) All plaintiffs to be available for their depositions prior to February 15, 1987.

Dated: January 12, 1987.

/s/ CHARLES A. LEGGE
Honorable Charles A. Legge
Judge, United States District Court
of Northern District of California

Approved as to form

PAUL T. HAMMERNESS
Paul T. Hammerness

Supreme Court, U.S.
FILED
SEP 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-2054

In The

Supreme Court of the United States

October Term, 1988

Dennis M. O'Connor, et al.,

Petitioners,

vs.

Estate of Marilyn Marie Conners, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The distinction between the professional judgment standard enunciated in *Youngberg v. Romeo*, 457 U.S. 307 (1982) and the deliberate indifference and/or gross negligence standards.

2. Whether the counter declaration of Dr. William Schwartzman raised genuine issues of fact that cannot be properly decided on a motion for summary judgment.

LIST OF PARTIES

Respondents: Estate of Marilyn Marie Conners; Howard Meredith; Lillian Beatty.

Petitioners: Dennis M. O'Connor; Fred Valenzuela; Stephen Donoviel; Thaddeus Kostrubala.

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UNITED STATES CONSTITUTION

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No. 87-2054

In The

Supreme Court of the United States

October Term, 1988

Dennis M. O'Connor, et al.,

Petitioners,

vs.

Estate of Marilyn Marie Conners, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988) and the decision of the United States District Court for the Northern District of California (Appendix 2 to the Petition).

STATEMENT OF THE CASE

1. Nature Of The Controversy

The decedent, Marilyn Marie Conners, was an attractive young woman admitted to Napa State Hospital prior to 1985. Due to a physical injury rendering her mentally disabled, she had the personality and intellectual capacity of a three year old. She was virtually helpless and unable to protect herself from adult manipulation and sexual aggressiveness.

Prior to and during 1985, John Lewis Duncan, a penal code patient, was confined at Napa State Hospital following a not-guilty by reason of insanity plea to a charge of rape and murder of a young woman. Following his admission, Mr. Duncan had physically threatened patients with violence and been found in possession of a knife, illegal narcotics and other contraband.

Petitioners knew or should have known that Mr. Duncan was not a suitable patient for Napa State Hospital. Mr. Duncan should have been transferred to Atascadero State Hospital, a prison facility specifically designated for the treatment of dangerous penal code patients and sex offenders.

On April 27, 1985, Mr. Duncan was permitted to roam the hospital grounds, unsupervised, pursuant to official and *de facto* policies then in effect. On that same date, Marilyn Marie Conners was allowed to leave her locked ward. Mr. Duncan enticed her to a remote area of the hospital grounds, where he raped and strangled her with her rosary bead necklace. Mr. Duncan thereafter left

her nude body with her hands tied behind her at approximately the same location where he had two to three weeks earlier assaulted and attempted to rape another female patient.

In their Complaint, Respondents alleged that Petitioners were grossly negligent and deliberately indifferent to patient safety by implementing and maintaining written and *de facto* policies that foreseeably resulted in the tragic death of Marilyn Conners. These policies included:

1. The admission of penal code patients to Napa State Hospital;

2. The failure to segregate penal code patients from non-penal code patients; and

3. The arbitrary granting of grounds privileges (P-Cards) to penal code patients at Napa State Hospital.

The Respondents contend that these and other practices constitute evidence of deliberate indifference/gross negligence and are such a substantial departure from professional standards as to violate Marilyn Conners' constitutional right to a safe environment while confined under state authority. *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982).

For several years prior to the rape and murder of Marilyn Conners, Napa State Hospital administrators, including the Petitioners herein, permitted the admission of criminally insane patients to Napa State Hospital who had committed rape, murder and mayhem. These patients, known as penal code or "P.C." patients, were confined at Napa State Hospital because they had either

demonstrated incompetence to stand trial due to mental illness or because of a determination that they were not guilty by reason of insanity.

Petitioners contend that Napa State Hospital's practices and policies of admitting Penal Code patients included thorough evaluations of the risk individual Penal Code patients posed to other patients. According to Petitioners, the Medical Director reviewed all risk assessments upon admission. However, according to Dr. William Schwartzman,[1] a long-time Napa State Hospital physician and the decedent's treating physician, the Hospital's practice regarding the admission of Penal Code

---

1. Dr. Schwartzman was employed at Napa State Hospital from 1963 through 1985. His extensive experience with treating violent mental patients includes ten years (1969-1979) on the psychiatric emergency service at San Francisco General Hospital. Dr. Schwartzman worked intensively with 100's of Penal Code patients between the years 1978 through 1984 at Napa State Hospital. Additionally, he was in charge of the Hospital's "maximum security unit" (A-5) for approximately 15 months from September 1981 to November 1982, during which time he treated, managed and assessed a large number of penal code patients and observed the assessment of these patients by other units and wards. Furthermore, in 1983, he was the psychiatric expert to State Senator Barry Keene, then Chairman of the California Senate Judiciary Committee, and testified concerning legislation pertaining to violent mental patients in the states' institutions. The Hospital terminated Dr. Schwartzman in May of 1985, within days after he publicly criticized the Hospital administration regarding the death of Marilyn Conners. *See, generally, Schwartzman v. Valenzuela*, 846 F.2d 1209 (9th Cir. 1988).

patients was contrary to the written policies and the representations contained in Petitioners' declarations.

In his declaration, Dr. Schwartzman states,

> All patients, including penal code patients, during the years 1981 - 1985 (and perhaps earlier and later) were seen briefly in the Admitting Suite upon arrival. With the exception of immediate, overt, and imminent violence or assaultiveness, they were not segregated in terms of past violent history or legal status.

(Schwartzman Declaration, paragraph 32).

Petitioners represent that "following admission to Napa State Hospital, Penal Code patients were kept segregated from the general patient population at Napa State Hospital, in locked wards." However, it is undisputed in the record below that Penal Code patients were not segregated from the civilly committed patient population:

> Napa State Hospital administration . . . (has) been indifferent to the known risks of mixing Penal Code and LPS patients together . . . With the exception of immediate, overt, and imminent violent or assaultiveness, they (Penal Code patients) were not segregated in terms of past violent history or legal status.
>
> Hence, patients with histories of considerable violence, whether including a current or prior Penal Code status, are mixed with disabled, retarded, brain damaged, helpless and non-violent patients.
>
> Napa State Hospital has been glaringly deficient in developing *any* kind of special treatment programs for the Penal Code group of patients in particular. These patients, who have special histories, legal circumstances and (by definition) virtually 100% association of their mental illness with violent and serious crime, were, until my departure in May 1985, housed on a multitude of wards, mixed with an array

> of patients with enormously varying problems and conditions, and as a consequence, given *no* special counseling, treatment or behavioral programs that were directed specifically at their violent proclivities or histories.

(Schwartzman Declaration, paragraphs 19, 27, 32).

Petitioners further argue that Penal Code patients only obtained grounds privileges (called a "P-Card") following a thorough analysis and assessment of the Penal Code patient's risk factor. However, while the Napa State Hospital written policy sets forth certain criteria, Dr. Schwartzman's declaration establishes that, in fact, this policy (Policy Directive No. 780) was not adhered to and that a wholly inadequate *de facto* policy existed. In fact, typically no professional assessment was made by any trained staff member or group of staff members to determine when a Penal Code patient met or failed to meet written policy criteria.

In his declaration, Dr. Schwartzman states:

> I completely disagree with Mr. Donoviel's declaration that Penal Code patients receive an adequate or meaningful assessment of their 'behavior, history, potential for dangerous behavior, potential for aggressive or assaultive behavior or for sexual acting out or unauthorized absence' as Policy Directive 780 requires.
>
> In my experience, hospital staff had received absolutely no in service training upon becoming employees, nor during their work here (during the years I worked on acute adult wards at Napa State Hospital) in the assessment of these particular elements, in mental patients in general, or in Penal Code patients in particular.

> It is my professional opinion that Napa State Hospital's functional assessment process for Penal Code patients to obtain grounds privileges is haphazard, indiscriminate, variable, and frequently conducted by staff with little experience in this particular assessment. As a consequence, it is my opinion and experience that there are many dangerous patients who slip through this process and wrongfully, on clinical and common sense grounds, obtain grounds privileges.
>
> Because of an absence of any specific unit or therapeutic setting of which the specific needs in terms of violence potential of the Penal Code patient can be assessed, such patients are often given grounds passes on faith and hope more than on a reasonable or professional assessment of their likelihood to act out their violent urges and emotions. This is the real or *de facto* policy, not as stated in Policy Directive No. 780.

(Schwartzman Declaration, paragraphs 14, 15, 21, 31).

Petitioners further allege that Napa State Hospital administrators had investigated and discovered that "as a group, Penal Code patients were less violent and assaultive than other patients at Napa State Hospital." (Petition, p. 4). However, as explained by Dr. Schwartzman, "The kind of assault that Marilyn Conners was the victim of is much more frequently committed by Penal Code patients than LPS patients." (Schwartzman Declaration, paragraph 29).

2. Proceedings Below

Petitioners brought a motion to dismiss the original Complaint which was granted with leave to amend. In response to Respondents' First Amended Complaint,

Petitioners brought a motion to dismiss or, in the alternative, a motion for summary judgment.

During that period of time, the Respondents were only allowed to conduct limited discovery. The Petitioners maintained that the Respondents were not entitled to conduct discovery because, in deciding on qualified immunity, the court need only determine whether the law was clearly established and need not consider factual disputes.

The District Court denied the motion for summary judgment, finding that the law was clearly established and that the counter declaration of Dr. Schwartzman raised triable issues of fact.

The Ninth Circuit affirmed, and held that "the facts alleged in the Schwartzman affidavit, if proven, could reasonably support the trier's finding that the Defendants were indifferent to patient safety and had made 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that (they) actually did not base the decision on such a judgment.' *Youngberg v. Romeo*, 457 U.S. at 323. The affidavits presented by the Defendants contradicted Dr. Schwartzman's claims. The pleadings and affidavits thus presented a genuine issue of fact." *Estate of Conners v. O'Connor, supra*, at 1209 (9th Cir. 1988).

ARGUMENT

I

INTRODUCTION

The Ninth Circuit's ruling in *Estate of Conners* is not a new test. Rather, the decision is consistent with *Youngberg v. Romeo*, 457 U.S. 307 (1982) and prior United States Supreme Court holdings interpreting the constitutional liberty interests of mental patients and liability standards applied in state custodial settings under 42 U.S.C. Section 1983.

The Petitioners grossly distort and misstate the facts as contained in the record on appeal. The Petitioners also erroneously contend that other circuits' opinions are inconsistent with the Ninth Circuit decision. The Ninth Circuit ruling is entirely consistent with other circuit courts of appeals' decisions regarding the standard of liability in custodial situations under Section 1983.

The Respondents' theory of liability is not predicated upon a difference of professional opinion between a hospital physician and hospital administrators regarding the appropriate assessment of violence and dangerousness in Penal Code patients. Rather, Respondents raise issues regarding the absence of the exercise of professional judgment in the hospital's practices and policies, including admitting and not segregating Penal Code patients, granting unsupervised ground privileges to Penal Code patients, and relying on untrained hospital staff to assess Penal Code patients' potential for dangerous behavior.

II

THE CONSTITUTIONALLY PROTECTED LIBERTY INTEREST TO SAFE CONDITIONS OF CONFINEMENT

The Fourteenth Amendment to the United States Constitution, Due Process Clause provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

This court has repeatedly stated that the purpose of the Fourteenth Amendment's Due Process Clause is to protect individuals against abuses of governmental power. As the court noted in *Wolff v. McDonnell*, 418 U.S. 558, 94 S.Ct. 2975 (1974),

> The touchstone of due process is protection of the individual against arbitrary acts of government.

Petitioners contend that mental patients' conditions of confinement do not raise matters of constitutional concern. However, in *Wolff v. McDonnell, supra*, 94 S.Ct. at 2974, this court struck down the state's identical argument as "plainly untenable," declaring, "There is no iron curtain drawn between the constitution and the prisons of this country." *See, Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119, 129, 97 S.Ct. 2532, 2540 (1977); *Meechum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538 (1976).

This Court has held that involuntary detention necessarily implicates constitutional rights. Confinement of an individual entails a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980). These principles apply to involuntary confinements in mental hospitals. As this court noted in *O'Conner v. Donaldson*,

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law.

O'Conner v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, concurring), *citing*, *Specht v. Patterson*, 386 U.S. 605, 608 (1967).

Similarly, the mere fact that an individual has been committed to a state mental institution under proper procedures does not deprive a person of his or her substantive liberty interests under the Fourteenth Amendment. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

As a general matter, the state bears no constitutional duty to provide substantive services to its residents. However, when persons are committed to state institutions, the state assumes certain duties and obligations. *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). These duties arise out of the custodial relationship between the state and the incarcerated individual. As succinctly stated in *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982),

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be hard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

See also, *Escamilla v. Santa Anna*, 796 F.2d 268 (9th Cir. 1986).

Prior to *Youngberg*, the Supreme Court recognized the constitutional right to safe conditions of confinement. In *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413 (1977), this court declared that "among the historic liberties so protected was a right to be free from and to obtain

judicial relief for unjustified intrusions on personal security."

In *Youngberg v. Romeo, supra,* this Court held that involuntarily committed patients in state institutions have a constitutionally protected liberty interest to reasonably safe conditions of confinement under the Fourteenth Amendment Due Process Clause. Citing to *Ingraham v. Wright, supra,* the *Youngberg* court concluded that mental patients as well as criminals have a liberty interest in a safe environment, stating,

> In the past, this court has noted that the right to personal security constitutes a 'historic liberty interest' protected substantively by the due process clause. And that right is not extinguised by lawful confinement, even for penal purposes.

Id. at 2458.

III

THE PROFESSIONAL JUDGMENT STANDARD

In *Youngberg v. Romeo,* this Court recognized that mental patients' liberty interests in safety are not absolute but must be balanced with the state's duty to provide therapeutic treatment.[2] The Court held that liability arises where a substantial departure from accepted professional judgment, practice or standards exists, stating:

---

2. The right to a safe environment and the right to treatment are not inherently antagonistic or conflicting. These interests are compatible and reinforce each other. A safe environment promotes treatment and appropriate treatment promotes a safe environment. (Lion, John R. & Reid, William H., Editors, Assaults Within Psychiatric Facilities, (1983)).

> The decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323, 102 S.Ct. at 2462 (footnotes omitted).

The Supreme Court's decisions subsequent to *Youngberg* concerning the liability standard in custodial settings for due process violations under 42 U.S.C. Section 1983, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986), did not change the *Youngberg* standard. In these cases, this Court held that mere negligence does not state a sufficient basis for Section 1983 liability. This Court had previously recognized that negligent conduct is not actionable under Section 1983. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Monroe v. Pape*, 365 U.S. 167 (1961).

In *Daniels* and *Davidson*, this Court expressly did not consider "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protection of the due process clause." *Daniels v. Williams*, 474 U.S. at 334, n.3; *Davidson v. Cannon*, 106 S.Ct at 360.[3]

---

3. Petitioners erroneously contend that this Court held in *Davidson* that the due process clause only proscribes *intentional* deprivations. In *Davidson*, the plaintiff did not allege anything more than mere negligence. Furthermore, the plaintiff did not challenge the district court's finding that the state officials did not act with deliberate indifference to his needs. 106 S.Ct. at 670. Since the plaintiff merely claimed negligence, this Court held that *Daniels* controlled.

Although this Court in *Daniels* and *Davidson* did not discuss the issue of whether state officials' gross negligence or deliberate indifference imposes liability under Section 1983, courts have previously held that deliberate indifference or gross negligence sufficiently states a Section 1983 claim in non-prisoner custodial settings. *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195 (1983); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1987); *White v. Rochford*, 592 F.2d 381, 387 (7th Cir. 1982); *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985); *Escamilla v. Santa Anna*, 796 F.2d 268 (9th Cir. 1986); *Walsh v. Brewer*, 733 F.2d 473 (7th Cir. 1984).

The Ninth Circuit's standard of conscious indifference amounting to gross negligence is in accord with *Youngberg v. Romeo* and this Court's prior decisions. In *Estelle v. Gamble, supra*, 97 S.Ct. at 291, this Court held that "deliberate indifference" to a prisoner's medical needs violates the Eighth Amendment and states a Section 1983 claim. The *Estelle* court defined deliberate indifference as the absence of a physician's exercise of professional judgment:

> Doctors choosing the 'easier and less efficacious treatment' of throwing away the prisoner's ear and stitching the stump may be attributable to *'deliberate indifference . . . ' rather than an exercise of professional judgment.*

Estelle v. Gamble, supra, 97 S.Ct. at 291, n.10. (emphasis added). By definition the exercise of professional judgment does not and cannot include gross negligence or deliberate indifference to a patient's life and health.

Since *Estelle,* courts have applied the "deliberate indifference" standard to cases involving allegations of a deprivation of the right to safety under the Eighth Amendment. *Little v. Walker,* 552 F.2d 993 (7th Cir. 1977), *cert. denied,* 435 U.S. 932, 98 S.Ct. 1507 (1978); *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981), *cert. denied,* 453 U.S. 950, 102 S.Ct. 27 (1981); *Withers v. Levine,* 615 F.2d 158 (4th Cir. 1980), *cert. denied,* 449 U.S. 849, 101 S.Ct. 136 (1980); *Martin v. White,* 742 F.2d 469 (8th Cir. 1984); *Watts v. Laurent,* 774 F.2d 168 (7th Cir. 1985), *cert. denied,* 106 S.Ct. 1466 (1985).

The Due Process Clause provides at least as great protection as provided by the Eighth Amendment. *Revere v. Massachusetts General Hospital,* 463 U.S. 239, 244, 103 S.Ct. 2979, 2983 (1983); *Wolff v. McDonnell,* 418 U.S. 557-558, 94 S.Ct. 2975 (1974). Thus, since "deliberate indifference" triggers the protection of the Eighth Amendment, the standard under the Fourteenth Amendment must be equivalent or lower. Petitioners urge the Court to hold otherwise.

Involuntarily committed mental patients are entitled to the same, if not greater, constitutionally protected liberty interests in safe conditions of confinement as prisoners. In *Youngberg v. Romeo,* 102 S.Ct. at 2458, the Court recognized:

> If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be

> unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions.

The *Youngberg* court further stated that:

> *Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals* whose conditions of confinement are designed to punish.

102 S.Ct. at 2461 (emphasis added).

The *Youngberg v. Romeo* court, in setting the professional judgment standard, stated that mental patients deserve greater protections than do criminals. Accordingly, mental patients need not meet a standard higher than the *Estelle* "deliberate indifference" standard in order for liability to attach under Section 1983. The court in *Youngberg* did not intend to articulate a standard that would provide greater protection to criminals than innocent and vulnerable mental patients. The *Youngberg* decision mandates that the scales be tipped in favor of mental patients and the Fourteenth Amendment over comparable or analogous Eighth Amendment guarantees.

Petitioners argue that any standard of liability is inappropriate in this case because state officials administration of state mental hospitals is not a matter of concern for federal courts or the Constitution. Petitioners argue that:

> Federal judges and juries are not able to competently balance relevant state interests involving care and treatment of the mentally ill; and concerns of federalism prohibit the federal judiciary from converting enforcement of the due process clause of the Fourteenth Amendment into a font of tort law.

(Petition, p. 7)

However, this argument blatantly contradicts this Court's recognition of the primary purpose of Section 1983 and the Fourteenth Amendment. *Monroe v. Pape, supra; Owen v. City of Independence,* 445 U.S. 622 (1980).

As stated in *Mitchum v. Foster,* 407 U.S. 225, 242, 92 S.Ct. 2151, 2162 (1972), "The very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights." The protection provided by this statute becomes even more vital concerning mentally disabled persons who, because of their mental illness, are vulnerable and easily victimized.

IV

THE NINTH CIRCUIT RULING RECOGNIZED THE EXISTENCE OF A GENUINE ISSUE OF FACT IN DISPUTE PRECLUDING SUMMARY JUDGMENT

The determination of a qualified immunity claim does not entail a determination of the merits of the Plaintiffs' claim. *Mitchell v. Forsyth,* 472 U.S. 511 (1985):

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law, whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell v. Forsyth, 472 U.S. at 528, 105 S.Ct. at 2816.

In the prior proceedings, the Respondents objected to the Court entertaining a motion for summary judgment on the merits without first giving the Respondents an opportunity to complete discovery.

Within this context, the Respondents filed the counter declaration of William Schwartzman, M.D., in opposition to Petitioners' Motion for Summary Judgment.

The declaration of William Schwartzman, M.D., does not espouse a particular treatment modality or philosophy. Rather, Dr. Schwartzman's declaration demonstrates the existence of factual disputes going to the ultimate issue of liability in the case.

Notably, the Ninth Circuit observed:

> The plaintiffs rely primarily on the affidavit of Dr. Schwartzman to establish the existence of a factual question of the violation of clearly established rights. A psychiatrist at Napa State Hospital for more than seven years, Dr. Schwartzman also had ten years of experience with violent mental patients. Dr. Schwartzman expressed a professional opinion that the hospital's 'approach in dealing with the assessment and determination of risk from violence, to non-violent patients from violent ones, is grossly and totally inadequate.' He stated that penal code patients are not given special consideration. Because assessment criteria are informal and vague, he continued, 'patients with considerable violence potential are granted ground passes . . . without careful regard to situations likely to evoke their violent tendencies.' Schwartzman stated that hospital staff have received no training on assessment of patients' potential for dangerous behavior. He also claimed that the hospital had been 'glaringly deficient in developing any kind of specialized treatment programs for the Penal

> Code group of patients.' He claimed that, despite a history of violence among penal code patients at the hospital, the hospital staff made no attempt to rectify the problems.

Estate of Conners v. O'Connor, supra, at 1208-1209.

Even under the Petitioners' analysis of *Youngberg,* the Respondents have demonstrated an absence of the exercise of professional judgment entitling them to a trial on the merits.

V

PETITIONERS MISREPRESENT THE APPLICABLE LAW IN OTHER CIRCUITS

On page 11 of their petition, Petitioners state that "the Ninth Circuit's ruling is inconsistent with opinions from other circuits which hold that gross negligence does not violate the due process clause." In support of this statement, Petitioners cite *Bradberry v. Pinellas County,* 789 F.2d 1513 (11th Cir. 1986); *Rankin v. City of Wichita Falls,* 762 F.2d 444 (5th Cir. 1985); *Archie v. City of Racine,* 826 F.2d 480 (7th Cir. 1987).

However, Petitioners' argument grossly misapplies and misrepresents those circuits' holdings. None of the cases cited by Petitioners involved custodial settings. All three cases involved situations raising the issue of state officials' duties and responsibilities owed to the general public. Furthermore, the courts specifically noted that these cases did not involve the constitutional interests implicated in a custodial setting.

In *Bradberry v. Pinellas County, supra,* a family of a boy who had drowned sued the county under Section

1983 for failing to adequately train the pool lifeguard. The Eleventh Circuit held that no cause of action existed since the decedent was not placed in a position of danger by County officials. "He was imperiled by his own voluntary act. . . ." *Id.* at 1517. The Eleventh Circuit then distinguished that case from a custodial setting case, stating,

> . . . there are times when the Constitution requires local governmental units to provide basic protective services to individuals with whom the government has created a special relationship. For example, jails and *mental hospitals* must be administered so that their occupants are housed in a safe manner . . . In the present case, however, there was no special relationship . . .

Id. at 1516, n.2 (emphasis added).

In *Rankin v. City of Wichita Falls, supra,* the family of a man who had drowned in a city treatment plant tank while working at the treatment plant sued the city. In holding that no Section 1983 cause of action existed, the Court also distinguished custodial setting cases, stating,

> This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state. *See, Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452.

Id. at 449.

In *Archie v. City of Racine, supra,* the plaintiff sued a fire department for failing to send a rescue squad. The issue in that case was the fire department's duty owed to the general public. The court held that under Section 1983, "an official's deliberate misuse of state power resulting in an infringement of the constitutionally protected right or interest is actionable under Section 1983." *Id.* at 489. The court further noted that reckless behavior

is actionable. *Id.* at 490. The court nowhere stated or implied that gross negligence or deliberate indifference does not violate the due process clause.

Petitioners' argument is all the more troubling because it is well established in the circuits cited by Petitioners that state officials' deliberate indifference or gross negligence in custodial settings to individuals' safety states a Section 1983 claim. *See, e.g., Taylor v. Ledbetter, supra,* at 793 (11th Circuit); *White v. Rochford, supra,* at 385 (7th Circuit) (indifference in the face of known dangers certainly must constitute *gross negligence*); *Bowers v. Devito, supra,* at 618 (7th Circuit) (state officials liable for failing to protect a person they have placed in danger).

VI

SANCTIONS SHOULD BE IMPOSED PURSUANT TO RULE 11

Rule 11 of the Federal Rules of Civil Procedure requires a court to sanction attorneys who submit pleadings which they know, or after "reasonable inquiry" should know, to be not "well grounded in fact," unwarranted "by existing law or a good faith argument for the extension, modification, or reversal of existing law" or "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Rule 11 was amended in 1983 to add new sanctions for violations of the Rule. This amendment was designed to encourage greater attention to pleading abuses and impose sanctions so as to discourage dilatory or abusive

tactics and help streamline the litigation process by lessening frivolous claims or defenses. (Advisory note to 1983 Amendment).

Rule 11 further provides that upon finding pleadings signed in violation of this rule, the court,

> Shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Pursuant to this rule, courts have sanctioned attorneys in a wide range of circumstances because the pleadings filed were frivolous or made without sufficient inquiry.

Admittedly, qualified immunity is an esoteric area of the law where the contours and boundaries are often not fully defined. However, Petitioners' misrepresentation of the facts and the applicable case law is unwarranted and unprofessional. The record demonstrates that this conduct is consistent with an apparent strategy on the part of Petitioners to harass and burden the Respondents and their attorneys while simultaneously delaying an eventual trial on the merits.

The District Court denied Petitioners' Motion for Summary Judgment recognizing that the law was clearly established and the counter declaration of William Schwartzman, M.D., raised triable issues of fact.

It is not the Ninth Circuit that has pronounced new law, but rather the Petitioners who are shamelessly inviting this Court to abandon precedent and provide state

hospital administrators with absolute immunity under the guise of qualified immunity while incompetence and gross neglect masquerade as professional judgment.

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Respectfully Submitted,

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